THE POLICE POWER AND INTER-STATE COMMERCE.

THE attention of the public has recently been attracted to the question of the relation of the police power to inter-state commerce by the so-called "original package" decision rendered by the Supreme Court of the United States in April last.[1] The majority of the Court there decided that a State law prohibiting the sale of intoxicating liquors, except for specified purposes, is void as to liquors imported from another State and sold by the importer in the original package. Two points of law are comprehended in this decision: —

1. An article imported from another State is within the domain of inter-state commerce until the original package is broken or sold by the importer.

2. Prohibitory liquor legislation is void so far as it applies to articles within the domain of inter-state commerce.

The first point involved, although never before adjudicated, falls within the principle of Brown *v.* Maryland,[2] where a similar decision was made as to the duration of foreign commerce. The application of that principle to inter-state commerce has been expected, and needs no comment here. The second point decided imposes an unexpected limitation upon the exercise of the State police power, and the matter deserves a careful examination.

The decision has not ceased to be of practical importance by reason of the recent legislation by Congress upon the subject,[3] for two reasons: first, it is held that the act is not retroactive, and gives no validity to legislation upon the statute books of the several

[1] Leisy *v.* Hardin, 135 U. S. 100. [2] 12 Wheat. 419.

[3] "All fermented, distilled, or other intoxicating liquors or liquids, transported into any State or Territory for use, consumption, sale, or storage, shall, on arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquors or liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."

States at the time the act was passed;[1] secondly, the act applies to intoxicating liquors only, leaving the case unaffected as an authority so far as its principle applies to other articles of inter-state commerce. It may be added further that the constitutionality of the act is not unquestioned.[2]

The most important power possessed by a government is the power to protect its citizens from danger, disease, and vice. This power we call the police power, and not being delegated to Congress by the Constitution, is reserved to the States exclusively.[3] The police power has sometimes been defined in terms so broad as to include nearly all the legislative powers of a State; but the power to make regulations for the benefit of commerce, or to promote the public convenience, is distinct from the power to preserve and protect the public health, morals, and safety. Properly used, the term "police power" applies only to the latter portion of the sovereign powers of a State.[4] That the use of intoxicating liquors may cause pauperism, disease, and crime is common knowledge. Legislation designed to regulate and prohibit the sale of intoxicating liquors, so far as the internal commerce of a State is concerned, has frequently been upheld by the United States Supreme Court as a valid exercise of the police power.[5]

The question presented in Leisy *v.* Hardin, and in Bowman *v.* Chicago & N. W. Railway Co.,[6] on which the court in the former case greatly rely, is, whether a State can make police regulations concerning articles of inter-state commerce, when such regulations amount to a prohibition of traffic in such articles. It was decided in the negative, on the ground that it would conflict with the commercial powers of Congress.

Congress derives its powers over inter-state commerce from that clause in the Constitution which gives it "power . . . to regulate commerce with foreign nations and among the several States." If Congress has made any regulations of inter-state commerce, any conflicting State legislation is invalid, although made in pursuance of an acknowledged power of the State. The power of Congress within its domain must be supreme. In the absence

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[1] *In re* Rahrer, 43 Fed. Rep. 556.

[2] See 41 Alb. L. J. 473; 31 Cent. L. J. 50, 227.

[3] United States *v.* Dewitt, 9 Wall. 41. [4] See 3 Harv. Law Rev. 193 *et seq.*

[5] Bartemeyer *v.* Iowa, 18 Wall. 129; Beer Co. *v.* Massachusetts, 97 U. S. 25; Foster *v.* Kansas, 112 U. S. 201; Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1.

[6] 125 U. S. 465.

of congressional legislation, the State has power to act unless Congress has been given exclusive power over the subject.

The commercial powers of Congress are not in terms exclusive; but it is now settled that they are exclusive where the subject-matter is national in character, and admits of and requires a uniform rule. Accordingly, it is held, for example, that a State cannot regulate the rates of transportation on goods destined to another State,[1] impose a tax on goods which are being transported into or through the State,[2] or prescribe the accommodations to be furnished passengers coming into or going out of the State.[3] Two tests, then, are to be applied to determine the validity of State legislation: (1) Does Congress have exclusive power over the subject-matter? (2) Does the law conflict with any act of Congress?

In Leisy *v.* Hardin and Bowman *v.* Chicago & N. W. Railway Co. it was not claimed that there was any conflicting act of Congress. It was the first test named above which the majority of the court thought the legislation before them failed to meet. In Leisy *v.* Hardin the court do say, "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of inter-state commerce are not such."[4] This statement, however, was not made to show a conflict between the State law and any congressional legislation. At the time of this decision the only legislation by Congress upon the subject of intoxicating liquors was to be found in the internal revenue laws. These laws were not passed to regulate commerce, but merely to tax certain articles when and where they were manufactured and dealt in, which is very far from a declaration that they should be dealt in and be subjects of commerce between the States. Attention was called to these acts of Congress in order to emphasize the undoubted fact that intoxicating liquors are articles of commerce. The decision proceeds upon the ground, and the whole opinion is devoted to showing, that the police power of the State does not extend to inter-state commerce, at least to the extent of prohibition.

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[1] Wabash, etc., Railway Co. *v.* Illinois, 118 U. S. 557.

[2] State Freight Tax, 15 Wall. 232.

[3] Hall *v.* De Cuir, 95 U. S. 485.

[4] 135 U. S. 100, 125.

The *ratio decidendi* of Leisy *v.* Hardin appears to be substantially this: The transportation of goods from one State to another is national in character, and requires a uniform rule. Congress, therefore, has exclusive power to regulate it. If Congress makes no regulations, it indicates its will that such commerce shall be free and unrestricted. The legislation in question is a regulation which does restrict it, and is, therefore, void.

If by "free and unrestricted" the court mean anything more than freedom from such commercial regulations as require a uniform rule affecting alike all the States, the inference is entirely unjustifiable, for it is only to this extent that Congress has exclusive jurisdiction over inter-state commerce. If Congress fails to act, all that is indicated is that it considers that there is no necessity for exercising its exclusive jurisdiction, — that is, making such regulations of commerce as should have a uniform rule in all the States. Certainly it cannot be inferred, from the mere inaction of Congress, that that body has thereby expressed its will that a State shall not exercise its police power upon inter-state commerce, where the exercise of it does not involve the exercise of powers given exclusively to Congress. The question to be determined, then, in each case, is, whether the regulation is of a nature where there should be uniformity in all the States.[1]

Police regulations do not require a uniform rule for all communities. The dangers to the health, safety, and morals of their citizens differ in nature and importance in the different States, and police regulations in each State should be adapted to the education and habits of its citizens. In one place one kind of regulation may be effective, in another place some other regulation is required, and in some communities prohibitory regulations are considered the only effective ones. Accordingly, the power to make police regulations was not delegated to Congress, but was reserved to the States respectively.[2] Furthermore, the power to regulate inter-state commerce was given to Congress for commercial reasons, and the States cannot be supposed to have intended to deprive themselves of so important a power as its police power, except so far as is necessary to enable Congress to properly exercise its power over inter-state commerce. As the mi-

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[1] See Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 482-483, per Matthews, J.

[2] United States *v.* Dewitt, 9 Wall. 41.

nority of the court, in Leisy *v.* Hardin, well say, "An intention is not lightly to be imputed to the framers of the Constitution or to the Congress of the United States to subordinate the protection of the safety, health, and morals of the people to the promotion of trade."[1]

Whether Congress, while having no power to make police regulations, can, under its power to regulate inter-state commerce, make regulations designed to secure the safety and morals of the citizens of the United States, — regulations, for example, as to the manner in which arsenic and gunpowder are sold in the original package, or the hours or places in which the intoxicating liquors in the original package may be sold, is, to say the least, of doubtful constitutionality. It is certainly inexpedient from a practical point of view. It is much more important that this class of regulations should be in accordance with the regulations affecting the internal commerce of a State, concerning which Congress has no power, than that there should be a uniform rule in all the States. The practical difficulties which would otherwise arise are apparent to any one. If in any store there is one rule as to the sale of articles in the original package, and another as to articles manufactured within the State, or where the package is broken, confusion would be the inevitable result, and it would be next to impossible to enforce either law. Congress has not attempted to make any uniform regulations, and it is generally conceded that a State may to a certain extent regulate inter-state commerce to protect itself and its citizens from injury.

"Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality unfit for human use or consumption."[2] The somewhat fanciful reason is given that "such articles are not merchantable; they are not legitimate subjects of trade or commerce," and "may be rightly outlawed." This cannot be the true reason why regulations by the State concerning the importation of such articles are not inconsistent with the commercial powers of Congress, for, if it were, it would

[1] 135 U. S. 100, 158. [2] Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 489.

follow that any regulations of commerce made by Congress would not apply to such articles. The true reason is, that the regulations are made in exercise of the police power, and do not conflict with any congressional legislation.

In Leisy *v.* Hardin the court say, as to articles of inter-state commerce, that "if directly dangerous in themselves the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."[1] Whether the court intended to include in this class, articles other than those "unfit for human use," is not clear, but other judges have not confined the police power of the State to such articles. Poisons and explosives are articles the use of which needs to be carefully regulated. "Arsenic, dynamite powder, and nitro-glycerine are imported into every State under such restrictions as to their transportation and sale as to render it safe to deal in them."[2] The right of a State to regulate the transportation of nitro-glycerine has been expressly recognized by Congress.[3] So, also, it has been held that a State may require all locomotive engineers in the State, although engaged in inter-state commerce, to be examined, and may prevent them from operating a locomotive unless duly licensed by the examining board.[4] "It is conceded that the power of Congress to regulate inter-state commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts that wherever there is any business in which, either from the products created or in the instrumentalities used, there is danger to life and property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable."[5]

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[1] 135 U. S. 100, 125.

[2] Bowman *v.* Chicago & N. W. Railway Co., 125 U. S. 465, 504, per Field, J.

[3] Rev. Stats., § 4280.

[4] Smith *v.* Alabama, 124 U. S. 465; Nashville, etc. Railway Co. *v.* Alabama, 128 U. S 96.

[5] Nashville, etc. Railway Co. *v.* Alabama, 128 U. S. 96, 99.

If, then, the police power extends to inter-state commerce, if the State, for the purpose of protecting the health and safety of its citizens, may regulate inter-state commerce to some extent, why may not its regulations extend to the prohibition of traffic in any articles, if such traffic is honestly believed to be dangerous to the community? The State prohibits merely because it deems that to be the most effective way of removing the evil in that community. A prohibition of traffic in any article is, indeed, in effect a declaration that such article shall not be an article of commerce. It is also true that the power of Congress to regulate commerce between the States must include the right to determine what shall be the subjects of such commerce. Otherwise, "the power to regulate commerce would become subordinate to the State police power."[1] Therefore, if Congress had prescribed that a certain article should be an article of inter-state commerce, or forbidden restrictions on its importation, a State could not prohibit its introduction within its limits and its sale in the original package. But until Congress has acted we have the same question as before: Is the regulation one that it is proper should be alike for all the States? And we are met with the same answer: Police regulations must be adapted to the communities where they have effect, and a country so large as this, and whose inhabitants differ so in characteristics in different sections, should not have one set of police regulations for the whole country. This is especially so, since any regulations made by Congress could have no application to the internal commerce of a State.

The conclusion reached by the court in the two cases under consideration does not appear to be tenable. The opinion in Bowman *v.* Chicago & N. W. Railway Co. appears to rest largely on a misconception of the police power. "Can it be supposed," says Mr. Justice Matthews, "that by omitting any express declarations on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the inter-state commerce of the country? If so, it has left to each State, according to its caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured, or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of in-

[1] License Cases, 5 How. 504, 600, per Catron, J.

toxicating liquors from all other States, it may also include tobacco or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the peace, comfort, or health of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufacture, or arts of any description, and prevent the introduction or sale within its limits of any or of all articles that it may select as coming into competition with those it seeks to protect. The police power of the State would extend to such cases as well as to those in which it sought to legislate in behalf of the health, peace, and morals of the people."[1] From which reasoning the conclusion is apparently drawn that the police power does not apply to inter-state commerce at all. With all due respect, however, to Mr. Justice Matthews, the police power would not extend to the cases named. The police power, properly so called, extends only to the protection of the health, morals, and safety of the people, and it seems perfectly reasonable to suppose that Congress by failing to act has intentionally left to each State to exclude any article which it may fairly deem inimical to the health, morals, and safety of its citizens. If a State does not act fairly, or, if ostensibly acting under its police power, its legislation discriminates against the citizens of other States, or affects objects and persons not within the scope of its purpose, there is ample authority to show that such acts are invalid, and not a legitimate exercise of the police power.[2]

In Leisy *v.* Hardin, the court, although relying greatly on Bowman *v.* Chicago & N. W. Railway, apparently do not misconceive in this way the extent of the police power of a State; but their opinion, at its very beginning, contains this proposition: "A subject-matter which has been confided exclusively to Congress by the Constitution [referring, as the context shows, to inter-state commerce], is not within the jurisdiction of the police power of the State unless placed there by congressional action."[3] No reasons are given other than those alluded to above, but the court cite, in support of this proposition, four cases, which it is desirable to examine.

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[1] 125 U. S. 465, 493.

[2] Henderson *v.* Mayor of New York, *infra*; Walling *v.* Michigan, *infra*.

[3] 135 U. S. 100, 108.

1. Henderson *v.* The Mayor of New York[1] was a case where the State law before the court imposed in effect a tax of a dollar and a half upon every immigrant landing at the port of New York. The State sought to defend this act as an exercise of its police power, claiming that its purpose was protection against pauper immigrants. The court held, however, that as the burden fell alike on all immigrants, without regard to their condition, it went beyond its professed purpose, and was not a valid exercise of the police power. What the powers of the State in the premises were, was expressly left open. "Whether in the absence of such action [by Congress] the States can, or how far they can, by appropriate legislation protect themselves against paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign sources, we do not decide."[2]

2. In Railroad Co. *v.* Husen,[3] the law in question prohibited the introduction into the State during eight months of each year of any Texan, Mexican, or Indian cattle. This was defended on the ground that it was designed to keep diseased cattle out of the State; but the court held that as the law applied to sound cattle as well as to diseased cattle, it went beyond the necessity of the case, and the act was therefore void. So far from denying that the police powers of the State may be applied to inter-state commerce, the court expressly admit that to be the law. "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while, for the purpose of self-protection, it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection."[4] Referring to the case of Henderson *v.* Mayor of New York and Chy Lung *v.* Freeman,[5] decided at the same time, the court say, "Neither of these cases denied the right of a State to protect herself against paupers, convicted criminals, or lewd women, by necessary and proper laws, in the absence of legislation by Congress, but it is held that the right could only arise from vital necessity. . . . They deny validity to any State legislation professing to be an exercise of

[1] 92 U. S. 259. [2] Ibid. 275.
[3] 95 U. S. 465. [4] Ibid. 472. [5] 92 U. S. 275.

police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government." [1]

3. The third case is Walling *v.* Michigan, [2] which is also cited in Bowman *v.* Chicago & N. W. Railway Co., as a case by which "the present case is concluded." This case turned upon the validity of a statute of the State of Michigan, which imposed a tax upon all persons engaged in the sale of intoxicating liquors, imposing a heavier burden upon the agents of non-resident dealers than it did upon those of resident dealers. The court held, that inasmuch as the tax operated to the disadvantage of the products of other States, it was in effect a regulation of commerce between the States, and the statute was therefore void. Replying to the suggestion that the tax was "an exercise of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people," the court say, "This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national Legislature." [3] The case is decided solely upon the ground of discrimination, and the judgment was in no way conclusive upon the court in a case like Bowman *v.* Chicago & N. W. Railway Co., where there was no discrimination. The court, in the latter case, note the difference in the two cases, and say, [4] "It would be error to lay any stress on the fact that the statute passed upon in that case [Walling *v.* Michigan] made a discrimination between the citizens and products of other States in favor of those of the State of Michigan. . . . This appears plainly from what was decided in the case of Robbins *v.* Shelby Taxing District," which is the fourth case relied upon in Leisy *v.* Hardin.

4. In Robbins *v.* Shelby Taxing District [5] the question of police power was not involved at all. The statute there declared to be void was one requiring all drummers, not having a licensed place of business within the Shelby Taxing District, and offering for sale or selling goods by sample, to be licensed and pay a fee therefor. The question discussed was whether the license tax was upon the occupation or upon commerce; and the court held that in effect it was a tax upon commerce, and a regulation of commerce, and

[1] 95 U. S. 465, 473. [2] 116 U. S. 446. [3] Ibid. 460.
[4] 125 U. S. 465, 496. [5] 120 U. S. 489.

therefore void; and that it was none the less a regulation of inter-state commerce because it regulated the internal commerce of the State in the same way. There was no pretence that the business of the plaintiff in error — selling stationery, etc., by sample — was inimical to the health or safety of the State, or that the law was passed in the exercise of the police power. This case covers an entirely different ground from Walling *v.* Michigan, and does not in any way impeach or modify that case.

None of these cases, therefore, sustain the proposition that inter-state commerce is not within the jurisdiction of the police power of a State. Indeed, there is no authority for such a doctrine, unless it be found in Leisy *v.* Hardin.

Notwithstanding the language used by the court in Leisy *v.* Hardin, it is not at all certain that they intended to decide the case on the ground that the police power of a State does not include inter-state commerce within its jurisdiction. The law in question prohibited traffic, which is somewhat different from regulating it; and it may be that the court thought that such a law was more a commercial regulation than a police regulation. The following language seems to bear this interpretation: "Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity, or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which in this particular has been exclusively vested in the general government, and is, therefore, void."[1] "To concede to a State the power to exclude, directly or indirectly, articles [of inter-state commerce] without congressional permission, is to concede to a majority of the people of a State represented in the State Legislature the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States represented in Congress."[2] In Bowman *v.* Chicago & N. W. Railway Co., Mr. Justice Field puts his concurring opinion expressly upon this ground. After noticing that the police power can be applied to inter-state commerce, referring to Mugler *v.* Kansas,[3] where a State law prohibiting the manufacture of intoxicating liquors within the limits of the State

[1] 135 U. S. 100, 123. [2] Ibid. 125. [3] 123 U. S. 623.

was held to be a valid exercise of the police power, he says: "The decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing the power of the State over property created within it and its power over property imported — its power in one case extending for the protection of the health, morals,and safety of its people to the absolute prohibition of the sale or use of the article, and in the other extending only to such regulations as may be necessary for the safety of the community until it has been incorporated into and become a part of the general property of the State. However much this distinction may be open to criticism, it furnishes, as it seems to me, the only way in which the two decisions can be reconciled."[1]

The distinction is, indeed, open to criticism, for the difference between prohibition and regulation is one of degree, not of kind. Whether the law amounts to a prohibition or not, it affects commerce in some degree, but being designed to secure the public health and safety, it is in either case a police regulation; and, therefore, as has been previously shown, even in the case of inter-state commerce it is a proper case for a State to act, so far as its legislation does not conflict with any act of Congress.

The decision in Leisy *v.* Hardin and Bowman *v.* Chicago & N. W. Railway Co. must be considered erroneous; but if they are to stand, they will undoubtedly be sustained on the ground stated by Mr. Justice Field, rather than on the ground that the police power does not apply to inter-state commerce. It is hardly possible to believe that the court would have decided that a mere regulation by a State of the sale of intoxicating liquors — for example, forbidding sales to minors, or to adults between eleven o'clock in the evening and six o'clock in the morning — would not be valid as applied to sales of liquor in the original package. But it is to be hoped that these decisions are not final, and that the opinion of the minority of the court will ultimately be adopted.

Undoubtedly it is oftentimes difficult to draw the line between State and National powers; but the line should be drawn so far as possible, so as to give full play to the powers of each. In these decisions the line is not so drawn. Concerning a portion of the property and transactions within its borders, a State may not legislate as it desires, in order to protect the health and morals of its citizens; and the exercise of its police power over other property

[1] 125 U. S. 465, 506.

and transactions is rendered ineffective. The police regulation that the State makes, may not conflict with any national regulation, and cannot interfere with the making of any; it may be a perfectly reasonable provision to prevent disease and crime; but as to inter-state commerce it may, under these decisions, be invalid. That such a consequence should follow from merely giving Congress "power . . . to regulate commerce with foreign nations and among the several States," a provision made solely for the benefit of trade, is a result which it is hardly presumptuous to say the framers of the Constitution could never have intended.

William R. Howland.

BOSTON, November, 1890.